No. 15430

United States Court of Appeals
FOR THE NINTH CIRCUIT

SAM BLASSINGAME,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

JEREMIAH M. LONG
Assistant United States Attorney

Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

THE BALLARD NEWS, SEATTLE, WASHINGTON — 1/18/58 — 45 COPIES

FILED
JAN 25 1958

No. 15430

United States Court of Appeals
FOR THE NINTH CIRCUIT

SAM BLASSINGAME,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

JEREMIAH M. LONG
Assistant United States Attorney

Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

THE BALLARD NEWS, SEATTLE, WASHINGTON — 1/18/58 — 45 COPIES

INDEX

Page

STATEMENT OF JURISDICTION 1

QUESTION PRESENTED 1

COUNTERSTATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT

I. *There Was no Prejudicial Error in Permitting the Government to Impeach Its Own Witness Nor in the Manner Impeachment Was Conducted* 11

II. *The Trial Court Did Not Err in Refusing to Grant a Mistrial* 18

III. *The Court Did Not Err in Reserving Ruling On Motion for Judgment of Acquittal on Counts I and II* 26

IV. *Error, If Any, With Relation to Evidence Adduced Under Counts I and II Did Not Prejudicially Affect the Jury's Verdict on Counts III and IV* 29

V. *The Evidence Is Conclusive in Support of the Conviction Under Counts III and IV* 31

CONCLUSION 34

TABLE OF CASES

D'Aquino v. *United States,* 192 F. 2d 338 (C.A. 9, 1951), cert. den. 343 U.S. 935 23

Enriquez v. *United States,* 188 F. 2d 313 (C.A. 9, 1951) 25

Glasser v. *United States,* 315 U.S. 60 (1941) 31

Miranda v. *United States,* 196 F. 2d 408 (C.A. 9, 1952), cert. den. 344 U.S. 842 .... 25, 26, 29

Page

Noell v. *United States,* 183 F. 2d 334 (C.A. 9, 1950) 20

Nye & Nissen v. *United States,* 168 F. 2d 846 (C.A. 9, 1948), affirmed 336 U.S. 613 .... 19, 25

Opper v. *United States,* 348 U.S. 84 (1954) 19

Remmer v. *United States,* 205 F. 2d 277 (C.A. 9, 1953), reversed 347 U.S. 227 28

Remus v. *United States,* 291 Fed. 501 (C.A. 6, 1923), cert. den. 263 U.S. 717 .... 19 - 20

Rowland v. *United States,* 207 F. 2d 621 (C.A. 9, 1953) 27

Sawyer v. *United States,* 202 U.S. 150 (1906) 24

Smith v. *United States,* 173 F. 2d 181 (C.A. 9, 1949) 20

Souza v. *United States,* 5 F. 2d 9 (C.A. 9, 1925) 23

Stein v. *United States,* 166 F. 2d 851 (C.A. 9, 1948), cert. den. 334 U.S. 844 25

Stoppelli v. *United States,* 183 F. 2d 391 (C.A. 9, 1950), cert. den. 340 U.S. 864 24

Tedesco v. *United States,* 118 F. 2d 737 (C.A. 9, 1941) 25

Todorow v. *United States,* 173 F. 2d 439 (C.A. 9, 1949), cert. den. 337 U.S. 925 32

United States v. *Calderon,* 348 U.S. 160 (1954) 27

United States v. *Curzio,* 179 F. 2d 380 (C.A. 3, 1950) 24

United States v. *Goldstein,* 168 F. 2d 666 (C.A. 2, 1948) 27

United States v. *Goodman,* 110 F. 2d 390 (C.A. 7, 1940) 31

United States v. *Sacony-Vacuum Oil Co.,* 310 U.S. 150 (1940) 24

Weaver v. *United States,* 216 F. 2d 23 (C.A. 9, 1954) 14

Wright v. *United States,* 192 F. 2d 595 (C.A. 9, 1951) 25

STATUTES

Page

21 U.S.C. 174 3

26 U.S.C. 4704(a) 3

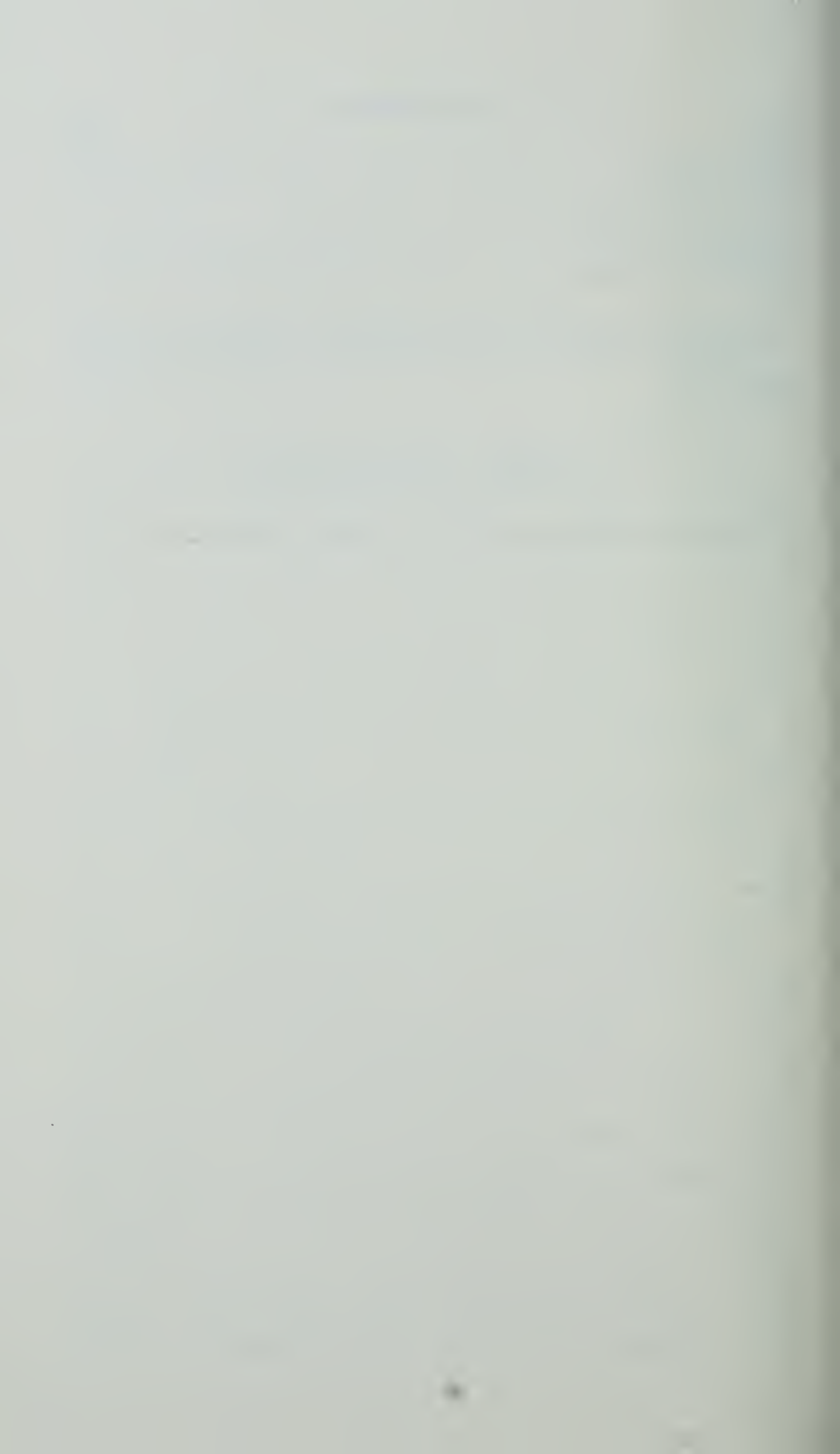
26 U.S.C. 4705(a) 3

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29(b) 10, 27

OTHER AUTHORITIES

2 Wigmore, *Evidence,* 3d Ed., 1940, §§ 302-304.......... 25



No. 15430

United States Court of Appeals
FOR THE NINTH CIRCUIT

SAM BLASSINGAME,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Appellee accepts appellant's statement of jurisdiction.

QUESTIONS PRESENTED

I. Whether there was prejudicial error in permitting the Government to impeach its own witness or in the manner impeachment was conducted.

II. Whether the Court erred in refusing to grant a mistrial:

A. When the Assistant United States Attorney asked his witness whether he was charged with murder in the State Court where the subject matter was previously brought out by the defense.

B. When the Assistant United States Attorney referred to previous purchases of narcotics in examination of his witness.

III. Whether the Court prejudicially erred in reserving ruling on motion for judgment of acquittal on Counts I and II.

IV. Whether error, if any, with relation to evidence adduced under Counts I and II, of which counts the defendant was acquitted, prejudicially affected the jury's verdict on Counts III and IV.

V. Whether there was sufficient evidence to support the conviction under Counts III and IV.

COUNTERSTATEMENT OF THE CASE

On September 12, 1956, an indictment was returned in the District Court of the United States for

the Western District of Washington, Northern Division, in Cause No. 49488 charging the appellant, Sam Blassingame, with four violations of the federal narcotic laws (Tr. 3-5). Counts I and II of the indictment charged violations on May 29, 1956, of Section 174, Title 21, U.S.C., and Section 4705(a), Title 26, U.S.C. Counts III and IV charged violations on June 19, 1956, of Section 174, Title 21, U.S.C., and Section 4704(a), Title 26, U.S.C.

Following a trial by jury on January 15 and 16, 1957, appellant was found not guilty on Counts I and II and guilty on Counts III and IV (Tr. 5). He was sentenced on January 28, 1957, to five years imprisonment and ordered to pay a $2,000 fine on each guilty count. The execution of the sentence imposed on Count IV was to run consecutive to and not concurrent with the execution of the sentence imposed on Count III (Tr. 7-8).

The evidence adduced by the Government at the trial may be summarized as follows as to Counts I and II:

On May 29, 1956, at approximately 9 o'clock in the evening federal and state narcotic enforcement officers with one Johnny Clark proceeded to a public telephone booth on the northeast corner of 19th and Roy Streets, Seattle, Washington (Tr. 12). Johnny

Clark and Chester G. Sprinkle, a narcotic officer for the Seattle Police Department, entered the phone booth and Johnny Clark dialed a number (Tr. 13). Clark asked Sam Blassingame, the man at the other end of the phone, if it was all right to come by (Tr. 13-14). Sam Blassingame answered, "Yes" (Tr. 17).

After the phone call Clark entered one of the Government cars (Tr. 17) and Agent Gooder, a federal narcotic officer, thoroughly searched Clark's person and clothing for narcotics (Tr. 51, 56-57). No narcotics were found (Tr. 51). He was then given $25.00 Government advance funds by Agent Gooder (Tr. 51), who drove Clark to 22nd Avenue and parked just south of East Thomas, Seattle (Tr. 52). Clark walked up to the back door of the house on 22nd and East Thomas, knocked on the door, and in a few moments was admitted by Sam Blassingame (Tr. 17-18). Subsequently, while Clark was in the building, Bernice Fitzgerald drove up to the house in an automobile and entered the same door Clark had previously entered, and within three minutes left in her automobile (Tr. 18). During the period of time Clark was in the house the door of the other side of the duplex opened and a man other than Blassingame swept off the back porch (Tr. 19). Later, the door Clark entered opened and Sam Blassingame stuck his head out, looked in both directions, stepped back in, and Clark came out (Tr. 19). Clark returned

to the Government car and turned over to Agent Gooder a small white paper bindle (Tr. 53) which contained heroin (Tr. 56).

Motion to dismiss Counts I and II, treated as a motion for judgment of acquittal, was made at the conclusion of the prosecution's evidence and ruling was reserved (Tr. 173 - 175). The defense introduced its case and at the conclusion thereof renewed its motion as to Counts I and II (Tr. 207). The Court reserved ruling with agreement by the defense (Tr. 207). The jury found the defendant not guilty upon these counts.

As to Counts III and IV, the evidence introduced by the Government at the trial may be summarized as follows:

On the 19th of June 1956, federal and City of Seattle narcotic officers, shortly after 9 p.m., met at Seventh and Madison, Seattle (Tr. 133). After a short conversation, Federal Narcotic Agents Fahey and DuPuis and Seattle Narcotic Detective Kirschner proceeded to 26th North and East Thomas Street, Seattle, (Tr. 71) where Kirschner got out of the car and, using a flashlight, searched the area around a fireplug at that intersection (Tr. 135). DuPuis, who was driving, parked the car, took his flashlight, and all three officers searched the area around the fireplug (Tr. 73).

The officers then got in the car and proceeded down Thomas Street to an alley approximately three-quarters of a block from the intersection (Tr. 74), Officer Kirschner having a view of the intersection at all times (Tr. 135). DuPuis called the other officers' attention to someone coming down the stairway from East Madison Street to the fireplug (Tr. 136). Kirschner and Fahey proceeded back up the street on foot to within fifty feet of the fireplug (Tr. 75) and, upon feeling lights behind them, flattened out on a terrace and Kirschner watched Sam Blassingame approach the fireplug, stop, turn, and go back up the stairs (Tr. 136 - 137). Blassingame turned on the stairs at the approach of the officers' car and DuPuis and Fahey recognized Sam Blassingame in the light of headlights of the car DuPuis was driving (Tr. 75, 123). Subsequently, the three officers proceeded to the fireplug, turned on their flashlights, and found a white object next to the fireplug (Tr. 76). The time which elapsed from the first search of the area until the officers found the object was no more than five or six minutes (Tr. 77) and during that time no one but Sam Blassingame was in the vicinity of the fireplug (Tr. 77). The white object had no tax stamps affixed to it (Tr. 143) and contained heroin (Tr. 155).

Subsequently on about October 3, 1956, Kirschner had a conversation with appellant at 118 25th North,

Seattle, wherein Blassingame stated that he saw Kirschner at the fireplug (Tr. 148-150).

The jury found appellant guilty on Counts III and IV.

SUMMARY OF ARGUMENT

I. *There Was No Prejudicial Error in Permitting the Government to Impeach Its Own Witness Nor in the Manner Impeachment Was Conducted.*

Johnny Clark, upon being called as a witness, denied that he purchased narcotics on May 29, 1956, with money furnished by federal agents, whereupon the United States claimed surprise. The defense agreed that the Government was surprised, but objected that no damage was done to the Government's case. The Court permitted the Government to impeach Clark.

1. To assert that the Government was not damaged by this testimony ignores the previous testimony of Government agents to the contrary.

2. In addition, the matters on which Clark was questioned, except for one question relating to previous buys, were within the limits of surprise because they concerned his making a telephone call and purchasing narcotics on May 29, 1956, the subjects concerning which Clark testified prior to the claim of surprise.

3. Though the manner in which the questions

relating to Clark's prior statement asked by Government counsel may have been questionable, since that statement could have been used as the basis of impeaching questions, and since the answers given were damaging to the Government's case, there was no prejudice to the appellant.

4. The Court's instructions limiting the purpose of Clark's testimony were extensive, were agreed to by the defense and, in view of Blassingame's acquittal under Counts I and II, with which counts Clark's testimony was concerned, no prejudice occurred.

II. *The Trial Court Did Not Err in Refusing to Grant a Mistrial.*

A. During examination of Clark by the Government, the witness was asked if he was charged with murder in the State Court.

1. There was no error in denying a mistrial because the objection raised was sustained and the jury carefully instructed to disregard the matter.

2. Clark was named by the defense much earlier in the trial as a murderer and it would be anomalous to permit appellant to introduce "murder" into the case when he felt it advantageous and claim error when it is casually referred to by the Government.

3. Further, any error relating to this matter

was obviously nonprejudicial because the jury returned a verdict of not guilty of Counts I and II, the only counts concerning which Johnny Clark testified.

B. Later, during the examination of Clark, the Government counsel asked a question concerning previous buys by Clark from Blassingame. The Court sustained objection to the question and no answer was given.

1. The Court instructed the jury extensively on the purpose of Clark's testimony, which, taken into consideration with the jury verdict acquitting Blassingame of Counts I and II, demonstrates that no prejudice resulted from asking the question.

2. Asking such a question without reply and in the light of the extensive instructions by the Court is analogous to questionable statements by counsel in argument or similar to a witness volunteering an answer indicating previous misconduct of a defendant where, when the matter is thoroughly covered in the Court's instructions, does not result in prejudicial error.

3. The matter of previous dealing in narcotics between Clark and Blassingame could have been inquired into by Government counsel to show Blassingame's knowledge or intent under the charges in this case.

III. *The Court Did Not Err in Reserving Ruling on Motion for Judgment of Acquittal on Counts I and II.*

1. By introducing evidence after the Court reserved ruling on motion for judgment of acquittal at the conclusion of the Government's evidence, the defense waived this objection, and the only question before this Court is whether or not the Trial Court erred in reserving ruling on such a motion at the conclusion of all the evidence.

2. Rule 29(b), Federal Rules of Criminal Procedure, gives the Court the right to reserve ruling at the conclusion of evidence on such a motion.

3. The defense expressly agreed to the Court's reserving ruling at the conclusion of all the evidence on the motion for judgment of acquittal.

4. There was sufficient evidence to go to the jury on Counts I and II.

IV. *Error, If Any, With Relation to Evidence Adduced Under Counts I and II Did Not Prejudicially Affect the Jury's Verdict on Counts III and IV.*

The jury's verdict on Counts I and II acquitting the defendant of these charges demonstrated that its deliberations were not affected with prejudice.

V. *The Evidence Is Conclusive in Support of the Conviction Under Counts III and IV.*

ARGUMENT

I.

There Was No Prejudicial Error in Permitting the Government to Impeach Its Own Witness Nor in the Manner Impeachment Was Conducted.

Upon calling Johnny Clark as a witness, after several introductory questions, the following occurred during examination by the Assistant United States Attorney:

> Q. On that evening [May 29, 1956], did you make a telephone call at all? A. No.
>
> Q. Did you on that evening go to the corner of 19th and Roy Street, up on Capital Hill and make a telephone call? A. No.
>
> Q. Pardon me? A. No, sir.
>
> Q. State whether or not you purchased any narcotics with money that was given you by the officers specifically so that you could buy some narcotics with that money on that night?
>
> A. No, sir. (Tr. 91)

Surprise was claimed by the Assistant United States Attorney. The jury was excused. Government counsel then stated:

> ". . . this morning in response to a subpoena, Mr. Clark appeared for trial about five minutes to ten.

I only asked him if he was in proper condition to testify and he said he was.

"I asked him if there was any change in his testimony from the statement he had previously given to the narcotics officers. He advised me, no, that he would tell the story straight as he had at that time.

"During the recess just ten minutes ago I again asked Mr. Clark if he had any problems concerning his testimony. He assured me he had none. He told me he would testify exactly to the truth as he had given to the agents (Tr. 95 - 96).

* * * * * * *

"Mr. Kosher: Your Honor, I agree with counsel. If he is surprised, he has a right to impeach his own witness, and I have no reason to doubt it. He undoubtedly is surprised by the testimony of his own witness." (Tr. 96)

Defense counsel then added

"But there is one thing that must be apparent to the Court, and that is that some affirmative damage must be done to the case. This witness has testified to nothing, practically, at this point. He simply says that nothing happened."

(Tr. 96 - 97)

The Court ruled that the Government was entitled to claim surprise.

After the jury returned, Government counsel proceeded to cross-examine Clark without objection concerning making the telephone call and purchasing narcotics from Sam Blassingame on May 29, 1956 (Tr.

108). Government counsel then obtained the admission from Clark that he had signed the statement (Tr. 110) which Agent Fahey had earlier testified he had taken from Clark and reduced to writing on May 29, 1956 (Tr. 69). (The contents of this statement are set out at Tr. 93 - 95.) Clark, however, denied that he knew what was in the statement (Tr. 110). Government counsel then proceeded to read from the statement and ask after each reading "Is that a true statement?", "Did you further say?", "Did that happen?", or "Did you also tell the officers?" (Tr. 113 - 115). Defense counsel objected in the following language:

> "Mr. Kosher: May the record show that the defendant Blassingame objects to any reading of this statement on the ground it is an attempt to impeach this witness without a proper foundation being laid for it." (Tr. 113)

A running objection to such reading was agreed to by the Government. (Tr. 114)

Subsequently, upon the conclusion of the Government's examination of the witness Clark, the Court extensively instructed the jury on the purpose of the questioning of Clark (Tr. 118 - 119), which instruction was agreed to by defense counsel (Tr. 119).

It is noted parenthetically that the explanation of Clark's change in his story is found in Officer Kirsch-

obligation. This could be done by cross-examination of Clark as to whether or not he made such a phone call or purchased narcotics on the night in question in order to obtain a contradiction while Clark was a witness and/or by means of a prior inconsistent statement to show that Clark at another time stated that he had made a telephone call from 19th and Roy Street on May 29, 1956, and purchased narcotics on that night.

After the Court ruled that the Government could impeach its own witness, counsel attempted to do so by means of leading questions (Tr. 108 - 109) without objection. During this examination the questions asked concerned the telephone call to Sam Blassingame and the purchase of narcotics on May 29, 1956. Failing to obtain a contradiction by the use of leading questions, counsel attempted to contradict his witness by means of a prior inconsistent statement which was marked as an exhibit (Tr. 105) but never introduced into evidence.

All matters contained in the statement of Clark upon which Government counsel's questions were based related to the telephone call or the purchase of narcotics on May 29, 1956, except one question relating to previous buys, which is discussed later in this brief. These facts were testified to by Sprinkle, Gooder and Fahey earlier in the trial. It is therefore submitted

that the questions introduced nothing new into the trial, except with regard to previous buys, and therefore were not beyond the limits of the surprise nor prejudicial.

When Government counsel commenced reading from the statement of Clark, defense counsel objected on the ground that the Government was attempting to impeach its own witness without a proper foundation being laid (Tr. 113). It is submitted that in view of Agent Fahey's testimony that on May 29, 1956, he took a statement from Clark which he reduced to writing (Tr. 69) and Clark's testimony that his signature appeared on the statement, it could have been used as the basis of impeaching questions. Further, the witness refused to answer these questions based upon his prior statement claiming the privilege against self-incrimination, or answered the questions in a manner damaging to the Government's case. With the facts in this posture it is evident that no prejudice occurred because of the manner the questions were asked.

At the conclusion of the Government's examination of Clark the Court extensively instructed the jury that the purpose of Clark's examination went solely to his credibility, to which instruction the defense explicitly agreed (Tr. 118-119). The jury's

verdict of acquittal on Counts I and II demonstrated, more than argument can, that the jury carefully heeded the admonition of the Court limiting the effect of Clark's testimony after surprise solely to the issue of his credibility and deliberated without prejudice.

II.

The Trial Court Did Not Err in Refusing to Grant a Mistrial.

A. The Assistant United States Attorney in the course of examining Johnny Clark, a special employee of the Bureau of Narcotics, whom he called as a witness, asked, "You are charged with murder in the State Court, are you not? A. That is right." (Tr. 111) Objection made by the defense counsel was sustained, motion for a mistrial was made, and the court instructed the jury as follows:

> "The Court sustained the objection to the question and you should disregard the answer made, if any, and also you are not to give any effect or draw any inferences from the question and the fact that it was put." (Tr. 111)

Appellant suggests that oblique reference was made to this matter again at Tr. 170. However, much earlier in the trial before Clark was a witness, during cross-examination of federal narcotic agent Gooder by defense counsel, the following took place:

Q. What remuneration had you arranged for Johnny Clark, who has been described as a stool pigeon and informer here?

A. In previous conversation with Mr. Clark, which I had no part of, but I was there—I was there, I was present—it was brought out that any assistance that we could be, in, I believe it was some type of case pending against him.

Q. What type of case was that.

A. I am not sure. I believe it was some type of murder case.

Q. Murder case? A. Murder.

Q. Murder?

A. Murder, I believe, yes . . . ." (Tr. 57)

First, the jury was instructed as effectively as was possible that the objection was sustained, that the answer should be disregarded, and no effect or inferences should be given to or drawn from the question and the fact that it was put.

As was observed by the Supreme Court in *Opper* v. *United States*, 348 U.S. 84, 95 (1954) "Our theory of trial relies upon the ability of a jury to follow instructions." See also, to the same effect, *Nye & Nissen* v. *United States*, 168 F. 2d 846, 855 (C.A. 9, 1948), affirmed, 336 U.S. 613 (1948). Prejudice is particularly unlikely when the court's instructions are given, as they were here, promptly and clearly. *Remus* v.

United States, 291 Fed. 501, 510 (C.A. 6, 1923), certiorari denied, 263 U.S. 717 (1923).

Furthermore, the facts upon which the question was based and the answer to the question had previously been adduced by the defense in cross-examination of federal narcotic agent Gooder. It would be anomalous to permit appellant to introduce "murder" into a case when he thinks it advantageous and then claim error when it is later casually referred to by Government counsel. See *Smith* v. *United States*, 173 F. 2d 181, 183 (C.A. 9, 1949); *Noell* v. *United States*, 183 F. 2d 334, 338 (C.A. 9, 1950).

In addition, it is submitted that any error relating to this question was obviously nonprejudicial because the jury returned a verdict of not guilty as to Counts I and II, the only counts concerning which the witness, Johnny Clark, testified.

B. Another question whether or not the Court erred in not granting a mistrial arose later on during the testimony of the same witness, Johnny Clark.

During the cross-examination of Clark by the Government, the following occurred:

> "A. I never got no narcotics from that man at no time.
>
> "Q. Didn't you ask him if this was the same stuff you had been—

"Mr. Roberts: Strike that. I believe that is material, your Honor. I will rephrase the question.

"Q. (By Mr. Roberts, continuing): Didn't you also ask Sam Blassingame at the time he was pouring this spoon for you if this was the same stuff you had been getting?

"Mr. Chavelle: I object to that, your Honor, and ask for a mistrial. Counsel was admonished to not go into that at all, and he is referring to some other transaction, or other stuff, that this man is alleged to have obtained from the defendant.

"We have a stipulation it will not be referred to and it has been referred to. It is prejudicial to the defendant's case.

"Mr. Roberts: This is a direct quote of a conversation that actually took place at the time of this sale.

"Mr. Chavelle: We agreed those things could not be gone into, as to what previously happened.

"Mr. Roberts: It has a direct bearing on the conditions of a buyer and seller at the time of this transaction.

"The Court: I think rather than—it may be but out of an abundance of caution I will sustain an objection to the question." (Tr. 117-118)

The Assistant United States Attorney asked one additional question and the Court instructed the jury as follows:

"Members of the Jury:

"The United States Attorney has just been examining this witness with respect to certain matters contained in a document that has been marked

as Exhibit No. 3. The Court wants to advise you as to the purpose of that questioning.

"It has appeared in connection with this witness that the Government has been surprised, and that they anticipated other—that this witness would testify otherwise than he has indicated on the stand.

"The Court has allowed the Government to examine this witness by the use of what are known as leading questions; in other words, permitted him to be cross-examined.

"These questions that have now been put here, which have been put after referring to this exhibit, are not to be construed as evidence of the facts contained in those questions. Those questions were put because they have some bearing upon the credibility of this witness, and while the witness has indicated his signature appears on that document, you are not to construe the questions as put to him from that document as being evidence in and of themselves insofar as this witness is concerned. The only purpose is to bring out matters that may have a bearing so far as the jury is concerned on whether or not they are going to believe this witness.

"Mr. Roberts, does that, in substance, cover the purpose?

"Mr. Roberts: I believe it does, your Honor.

"The Court: Mr. Chavelle and Mr. Kosher?

"Mr. Chavelle: Yes.

"Mr. Kosher: Yes" (Tr. 118-119)

Although the instructions to the jury were not that they should disregard the fact that the question was asked but that the entire testimony of Clark

after the claim of surprise should be considered by them only with regard to the credibility of Clark, it is submitted that such instruction was sufficient to eliminate the prejudice, if any, in asking the question. In this connection, it is again emphasized that the verdict of acquittal as to Counts I and II, the only counts concerning which Clark testified, demonstrated that the admonition of the Court was heeded and the jury deliberated without prejudice.

D'Aquino v. *United States*, 192 F. 2d 338 (C.A. 9, 1951), certiorari denied, 343 U.S. 935, at page 367 states:

> "Our system of jurisprudence properly makes it a matter primarily for the discretion of the trial court to determine whether prejudicial misconduct has occurred. An appellate court will not review the exercise of the trial court's discretion in such a matter unless the misconduct and prejudice is so clear that it can be said that the trial judge has been guilty of an abuse of discretion."

The danger in such a question is that it does not logically tend to prove the offense charged. *Souza* v. *United States*, 5 F. 2d 9, 10 (C.A. 9, 1925). Prejudice, however, is particularly unlikely where the court's instructions are given, as here, promptly and without fuss in disposing of what was under the circumstances, a minor problem. The trial judge ". . . had seen and heard the entire episode. He was not impressed with

the contention . . ." *United States* v. *Curzio*, 179 F. 2d 380, 381 (C.A. 3, 1950).

It is submitted that asking the question without reply is similar to an improper statement not substantiated by the evidence in argument where the ordinary rule is that the error is cured by withdrawing the statement. *Sawyer* v. *United States*, 202 U.S. 150, 167-168 (1906); *United States* v. *Sacony-Vacuum Oil Co.*, 310 U.S. 150, 238-240, 242-243 (1940), especially if made in the excitement of trial (see *Sawyer* v. *United States, supra,* at page 168). Here, the Court's instruction had the same effect as withdrawing the statement in that the instruction took the statement from the jury's consideration of Blassingame's guilt or innocence.

Such a question is also analogous to a witness volunteering an answer indicating previous misconduct of a defendant.

In *Stoppelli* v. *United States*, 183 F. 2d 391 (C.A. 9, 1950), certiorari denied, 340 U.S. 864, where a government witness volunteered answers indicating that the defendant was a known criminal narcotic dealer, in disposing of the matter, the following language was used at page 395:

> "There is no merit in this complaint. The trial judge fully covered the matter by immediate ap-

> propriate instructions. We hold the incident to have had no substantial adverse effect upon the fairness of the trial. It was but a transitory incident not proximately derogating from the intrinsic fairness of the trial. In a similar situation, the Court of Appeals of the Third Circuit ruled as we do. United States v. Curzio, 179 F. 2d 380. See also, Marsh v. U. S. 3 Cir., 82 F. 2d 703."

Furthermore, it is submitted that the question asked was not error in examination of Johnny Clark for the reason that evidence of previous dealings between Clark and Blassingame would have been admissible for the purpose of tending to show appellant's knowledge and intent in committing the acts alleged in Counts I and II. *Stein* v. *United States*, 166 F. 2d 851, 854 (C.A. 9, 1948), certiorari denied, 334 U.S. 844; *Enriquez* v. *United States*, 188 F. 2d 313, 315, 316 (C.A. 9, 1951); *Wright* v. *United States*, 192 F. 2d 595, 597 (C.A. 9, 1951); *Nye & Nissen* v. *United States, supra.* See also, *Miranda* v. *United States*, 196 F. 2d 408, 409 (C.A. 9, 1952), certiorari denied, 344 U.S. 842; *Tedesco* v. *United States*, 118 F. 2d 737 (C.A. 9, 1941); 2 Wigmore, *Evidence*, 3d Ed., 1940, §§ 302-304. Consequently, where the Court sustained the objection to the question, no answer was permitted by the witness, and the Court's instructions were prompt, no prejudice resulted.

Again, a persuasive factor in demonstrating the lack of prejudice to appellant by reason of asking the

question is that appellant was found not guilty of the counts concerning which Clark testified. *Miranda* v. *United States*, *supra*, at page 409.

III.

The Court Did Not Err in Reserving Ruling on Motion for Judgment of Acquittal on Counts I and II.

Upon the conclusion of the Government's case the defense moved to dismiss Counts I and II for the reason that there was no proof sufficient to take these counts to the jury (Tr. 173). The Court reserved ruling (Tr. 175). The defense then introduced its case and at the conclusion thereof the following occurred:

> "Mr. Chavelle: If the Court please, the defense rests at this time.
>
> "The Court: All right.
>
> "Mr. Chavelle: We would like to make a motion.
>
> "The Court: Do you wish to make the same motion you made before?
>
> "If agreeable with you, the Court will consider they are made as though made now, and will reserve ruling.
>
> "Mr. Chavelle: All right.
>
> "The Court: Is that agreeable?
>
> "Mr. Chavelle: Yes." (Tr. 207)

By introducing evidence when the Court reserved ruling at the conclusion of the Government's

case on the defense motion to dismiss as to Counts I and II the defendant waived that motion, assuming that the motion may be considered a motion for a judgment of acquittal.

A case directly in point is *United States* v. *Goldstein*, 168 F. 2d 666 (C.A. 2, 1948), where ruling on defense motion at the conclusion of the Government's case was reserved and renewed at the conclusion of all the evidence and reserved again. The Court said at page 670:

> ". . . we have a situation where the appellant elected to proceed with his defense on the merits without insisting upon first having a definite ruling upon his motion. The effect of that is, we think, the same as it would have been before the new Rule. On the assumption that it was erroneous not to grant the motion, the appellant could have taken his exception and declined to defend upon the merits . . . if the evidence is short as the prosecution leaves it, he may take advantage of that. But if he amplifies the record on the facts in attempting to make a case for acquittal he must assume the risk of having the prosecution's case bolstered in the process . . . Consequently, the motion to dismiss made at the close of all the evidence is the only one now open for consideration."

See also *United States* v. *Calderon*, 348 U.S. 160, 164 (1954), and

Rowland v. *United States*, 207 F. 2d 621, 622 (C.A. 9, 1953).

With regard to the motion at the conclusion of all the evidence, Rule 29(b), Federal Rules of Crim-

inal Procedure, is explicit in giving the court authority to reserve ruling. It provides in pertinent part:

> "If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."

In addition, where there was express agreement of opposing counsel to the reservation (Tr. 207), the matter cannot be raised at this time.

Further, the Government submits that the evidence in the instant case was sufficient to go to the jury on Counts I and II. Where evidence is circumstantial, as it was with regard to Counts I and II, the standard to be used is set out in *Remmer* v. *United States*, 205 F. 2d 277, 288 (C.A. 9, 1953), reversed on other grounds, 347 U.S. 227:

> "If reasonable minds *could* find that the evidence excludes every reasonable hypothesis but that of guilt, the question is one of fact and must be submitted to the jury."

Here reasonable minds could so find. The telephone call was made to Sam Blassingame (Tr. 13); Blassingame opened the door to let Clark into the apartment (Tr. 17, 18); Clark went to see Blassingame with Government advanced funds for the purpose of purchasing narcotics (Tr. 51); he was let out

of the apartment by Blassingame (Tr. 19); and he returned without the advance funds and delivered to Fahey a package containing narcotics (Tr. 53, 56). From this evidence it is apparent that reasonable minds could find that every reasonable hypothesis but that of guilt had been excluded.

IV.

Error, If Any, With Relation to Evidence Adduced Under Counts I and II Did Not Prejudicially Affect the Jury's Verdict on Counts III and IV.

A case somewhat stronger on its facts indicating the possibility of prejudice in permitting evidence to be introduced on counts barred by the statute of limitations and permitting the invalid counts to go to the jury with the good count, decided by this Court, was *Miranda* v. *United States, supra.*

The appellant was charged in ten counts with making a false statement under oath as a witness in ten separate naturalization proceedings of ten different applicants. The crimes charged in the first six counts were allegedly committed more than three years before the date of the indictment. Appellant plead not guilty to all counts and prior to trial moved for dismissal of counts one to six, inclusive, on the ground that prosecution was barred by the general three-year statute of limitations. The motion was denied and

appellant was tried concurrently on counts one to six and count eight. Counts seven, nine, and ten were dismissed on the motion of the prosecution during the course of the trial. The jury returned a verdict of guilty as to count eight only and found the appellant not guilty as to the remaining counts. At page 409 this Court said:

> "The principal contention pressed by appellant is that the evidence introduced for the purpose of proving commission of the crimes charged in the allegedly barred counts was inadmissible and that its allowance in evidence constituted prejudicial error. It is urged that the admission of this evidence so infected the jury's consideration of the charge in count eight as to render the verdict of guilt on that count invalid.
>
> "For the purposes of this decision we need not determine whether the three year statute of limitation was applicable to the offense here charged or whether prejudice might not, under any conceivable circumstances, result from compelling the accused to stand trial upon a number of counts, some of which are barred. For we find here, as was held in Marzani v. United States, 83 U.S. App. D.C. 78, 168 F. 2d 133, 138, affirmed by an equally divided court, 335 U.S. 895, 69 S.Ct. 299, 93 L.Ed. 431, that the error, if any, in permitting the first six counts to remain in the indictment and go to the jury was harmless. Cf. Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. Appellant concedes that the evidence relative to counts one to six was admissible for the limited purpose of tending to show appellant's knowledge and intent in committing the acts alleged in count eight, Nye & Nissen v. United States, 336 U.S. 613, 618, 69 S.Ct. 766, 93 L.Ed.

> 919; see 2 Wigmore, Evidence, 3d ed., 1940, §§ 302-304, but complains that the jury was not instructed as to such limited purpose for which the evidence was to be considered."

After finding that the jury was adequately instructed, the opinion continues at 410:

> "Another persuasive factor demonstrating the lack of prejudice to appellant by reason of the admission of testimony relative to counts one to six is that, unlike the situation in Marzani, supra, appellant was found innocent as to the allegedly barred counts. The reasonable inference is that the jury disbelieved testimony adduced to prove the crimes charged in those counts. Cf. Culjak v. United States, 9 Cir., 53 F. 2d 554, 556; Brown v. United States, 7 Cir., 22 F. 2d 293."

With regard to the errors of misconduct alleged, in addition to the argument above made in this connection, we add that jurors may be credited with "sufficient common sense and discrimination to enable them to evaluate conduct and remarks of counsel even if the conduct and remarks should offend ordinary standards of propriety." *United States* v. *Goodman*, 110 F. 2d 390, 395 (C.A. 7, 1940).

V.

The Evidence Is Conclusive in Support of the Conviction Under Counts III and IV.

The standard to be used in examining the sufficiency of evidence is set out in *Glasser* v. *United States*, 315 U.S. 60, 80 (1941):

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

Again, this Court framed the standard in the following language in *Todorow* v. *United States*, 173 F. 2d 439 (C.A. 9, 1949), certiorari denied, 337 U.S. 925.

> "The contention calls for an examination of the basic facts as the jury could have found them from the evidence if every conflict in the testimony had been resolved in favor of the appellee."

The basic facts as the jury could have found them from the evidence if every conflict in the testimony had been resolved in favor of the appellee are as follows:

Detective Kirschner, Agent Fahey and Agent DuPuis searched with flashlights the area surrounding the fireplug located at 26th North and East Thomas Street, Seattle, shortly after nine o'clock on the evening of June 19, 1956 (Tr. 71 - 73). They then proceeded down Thomas Street about three-quarters of a block (Tr. 74), Kirschner having a view of the intersection at all times (Tr. 135). When DuPuis called Kirschner and Fahey's attention to someone coming down the stairway to the intersection from East Madison Street, Kirschner and Fahey proceeded on foot to

within fifty feet of the fireplug (Tr. 136-137). Kirschner watched Blassingame approach the fireplug, stop, turn, and then go back up the stairs to East Madison (Tr. 136-137). At the approach of DuPuis' car, Blassingame stopped, turned, and in the light from the headlights of DuPuis' car, Fahey, Kirschner and DuPuis all clearly recognized Blassingame (Tr. 123). Subsequently, upon a search of the fireplug area the officers found a white object next to the fireplug (Tr. 76). The time which elapsed from the time of the first search of the area until the officers found the object was no more than five or six minutes during which time no one but Blassingame was in the vicinity of the fireplug (Tr. 77). The white object had no tax stamps affixed to it (Tr. 143) and contained heroin (Tr. 155).

Subsequently, on about October 3, 1956, Kirschner had a conversation with Sam Blassingame at 118 25th North wherein Blassingame stated he saw Kirschner at the fireplug (Tr. 148 - 149).

It is submitted that the evidence conclusively supports the conviction under Counts III and IV.

CONCLUSION

We submit that no prejudicial error occurred during the trial, which was conducted with conspicuous fairness, and that the evidence was conclusive in support of the conviction under Counts III and IV. We ask that the judgment be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

JEREMIAH M. LONG
Assistant United States Attorney